Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1980

No. **79-1347**

STANLEY H. SPENCER, Petitioner,

v.

GREYHOUND LINES, INC.

AND

AMALGAMATED TRANSIT UNION, LOCAL # 1516

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 26, 1980

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Stanley H. Spencer, respectfully prays that a writ of certiorari issue to review the judgement

and opinion of the United States Court of Appeals for the Fourth Circuit Court entered in this proceeding on November 1, 1979.

OPINION BELOW

The opinion of the Court of Appeals, unreported, appears in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, appears in the Appendix hereto.

JURISDICTION

The judgement of the United States District Court for the Eastern District of Virginia, Richmond Division, was entered on August 1, 1979. A timely appeal to the United States Court of Appeals for the Fourth Circuit Court was made and decision was re-affirmed on November 1, 1979. A timely prtition

for rehearing en banc was denied on December 5, 1979, and this petition for certiorari was filed within 90 days of that date. This Court-s jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court and United States Court of Appeals for the Fourth Circuit Court erred in dismissing petitioner's complaint under Title VII of the Civil Rights Act of 1964 based on the finding that the successor complaint was filed more than 90 days after petitioner received a Right to Sue Letter from the Equal Employment Opportunity Commission (EEOC).

2. Whether the trial court and United States Court of Appeals for the Fourth Circuit Court erred in denying counsel access to subpoenaed material which would have had a bearing on the

credibility and perhaps the motive of certain employees of Greyhound and the Union.

3. Whether the petitioner was denied due process under the law in accordance with the Fourteenth Amendment to the United States Constitution by the dismissal of the Title VII suit and refusal of the trial court to give effect to the request for a subpoena duces tecum.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1981. Use of racial bias in policies and practices

A company or person shall not use racial bias in policies and practices in discharging and terminating an employee.

Title VII, Civil Rights Act of 1964

United States Code, Title 42:

§ 2000-e-5(F)(1). Filing of claim with the Federal District Court

A suit charging violation of any provision of Title VII of the Civil Rights Act of 1964 shall be timely filed and brought within 90 days from the issuance of a "right to sue" letter from the EEOC.

Federal Rules of Civil Procedure

Rule 41(a)(2). Dismissal of cases

An action shall not be dismissed at the plaintiff's request except upon order of the court and upon such terms and conditions as the court deems proper. Dismissal under this section is without prejudice unless specifically noted otherwise in the order.

Federal Rules of Civil Procedure

Rule 34. Production of Documents

Rule 34 authorizes access, inspection, examination, copying and photo-

graphing of documents or objects in the possession or control of another party.

STATEMENT OF CASE

Petitioner, Stanley H. Spencer, a black male citizen of the United States and a resident of the State of Virginia was until December 18, 1975, an employee of Greyhound Lines, Inc. and while so employed, was a member of Local Union No. 1516, of the Amalgamated Transit Union.

On December 18, 1975, Spencer was terminated by Greyhound for (1) driving a bus on an expired physical card; (2) failing to turn in Department of Transportation Logs for two months; and (3) his past record.

He brought suit against Greyhound pursuant to 42 U.S.C. § 1981, charging the company with racial bias in its policies and practices and for unlaw-

fully discharging and terminating him from his employment because of his race. Spencer also charged Local 1516 with failing and refusing to arbitrate his termination because of his race.

Petitioner, Stanley H. Spencer, a black male, brought an action against respondents, Greyhound Lines, Inc. (Greyhound) and Amalgamated Transit Union Local No. 1516(The Union). As noted, petitioner was terminated by Greyhound on December 18, 1975, and thereafter filed a grievance with the Union concerning his discharge. In the instant action, petitioner alleged that Greyhound unlawfully terminated him because of his race and that the Union failed to adequately represent him because of his race. Jurisdiction is alleged under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et

seq., as well as other statutes. In the Federal District Court action, the respondents moved to dismiss the Title VII claim on grounds that the action was untimely filed.

The applicable statutory provision, 42 U.S.C. § 2000e-5(F)(1), requires that a complaint alleging race discrimination under Title VII must be filed within 90 days after the plaintiff has received a Notice of Right to Sue from the Equal Employment Opportunity Commission (EEOC).

In the action, petitioner received two Notices of Right to Sue from the EEOC, one dated December 27, 1976, and another dated January 10, 1977. Using the later of these two dates, 90 days would have elapsed on April 10, 1977. The instant compl-int was not filed until November 14, 1977, many months

after the expiration of the 90 day period. However, the question and effect of an intervening suit by the same party alleging the same cause of action must be considered.

Originally, petitioner filed his Title VII complaint on March 4, 1977, well within the 90 day time limit. (Spencer v. Greyhound Lines, Inc., CA77-0121-R.) That case was set down for trial on October 31, 1977. On that date, however, petitioner dismissed his original counsel and retained new counsel. Petitioner's new counsel asked the Court for a continuance so that he would have time to prepare the case adequately. Alternatively, petitioner's counsel requested a voluntary dismissal without prejudice pursuant to the Federal Rules of Civil Procedure, Rule 41(a)(2). The motion for continuance

was denied, but the motion for voluntary dismissal was granted. The Court stated that the voluntary dismissal would be without prejudice provided that petitioner post a bond to cover the fees of opposing counsel and that any new suit on the same causes of action be filed within 15 days of the voluntary dismissal. In granting the motion for voluntary dismissal, the Court also stated from the bench: "The Court infers in no manner its view as to whether the pendency of this (the original) action had tolled any statute. That is a matter to be determined at the appropriate time and under appropriate pleadings." The petitioner filed a new suit on the same causes of action on November 14, 1977.

The question raised by respondents in their motions to dismiss the Title

VII action was whether the filing of a successor complaint under Title VII after the original complaint was dismissed pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and wherein the successor complaint was filed more than 90 days after plaintiff had received a Right to Sue Letter from the EEOC was timely filed.

Respondents conceded in their motion for dismissal that plaintiff's original action, which was filed on March 4, 1977, in the Federal District Court, Eastern District of Virginia, was brought within 90 days of the Notice of Right to Sue Letters, dated December 27, 1976 and January 10, 1977. Their main contention was that, once the matter was dismissed without prejudice on the motion of the plaintiff, that the dismissal did not toll the Statute of

Limitations and that refiling of the complaint on November 14, 1977, was in fact, a new filing. Hence, the original 90 day time limitations from the date of the Right to Sue letters were still applicable and, consequently, plaintiff's action should be dismissed. The Federal District Court for the Eastern District of Virginia, held in favor of this argument and held that the 90 day period for filing Title VII actions was not tolled by the pendency of the original action and thus, the Title VII claim was dismissed.

Respondents placed a great deal of reliance on the Fourth Circuit case of Stebbins vs. Nationwide Mutual Insurance Company, 469 F. 2nd 268(4th Cir. 1972), cert. denied, 410 U.S. 939, 35 L. Ed. 2nd 606(1973). The facts in Stebbins are clearly distinguishable

from the instant case. In Stebbins, plaintiff filed a charge against an insurance company with the EEOC. Before Stebbins received a Right to Sue Letter, he filed suit in the United States District Court of the District of Columbia. The Court found that his decision to file suit prior to receiving a Right to Sue Letter was a deliberate attempt on his part to establish precedent that venue of a Title VII action was controlled by the general federal venue statute rather than the special venue provisions of Section 2000e-5(f). Seventeen months after Stebbins received his Right to Sue Letter, he filed a second motion in the Eastern District of Virginia and claimed that the original action filed in the District of Columbia tolled the Statute of Limitations imposed by Section 2000e-5(f).

The question before the Fourth Circuit was whether the action filed in the District of Columbia under the general federal venue statute tolled the time limitation imposed by Title VII. The Court he d that the time limitation under Title VII was jurisdictional and required strict adherence, and that any remedies for resulting inequities imposed by this statute of limitations were to be provided by the Congress and not by the courts. The Fourth Cir-

uit found that Stebbins was, in fact, a professional litigant and made the following observation:

> Plaintiff is a uniquely sophisticated litigant in Title VII matter... In connection with this litigation he has often demonstrated what one court has characterized as an "intentional, wilful and contemptuous" disregard of both court and statutory

> rules and requirements ... Plaintiff was thoroughly acquainted with the provisions both as they fix time provisions on the right to sue and fix venue ... and his way was the intentional disregarding of the statutory provisions. 469 F2nd at 270.

In the case at bar, Mr. Spencer is not a sophisticated litigant. His present dilemma was brought about by a failure to communicate with his erstwhile attorneys, and the fact that he sought a Rule 41(a)(2) dismissal was an eleventh hour attempt to avoid having to proceed against very sophisticated defendants, a national corporation and a national trade union, in a case which was, from a plaintiff's posture, improperly prepared for a trial on the merits. That Court made an oral finding from the bench that Mr. Spencer was "the architect of his own undoing".

Yet, there was no finding that Spencer's approach to his own dilemma was caused by a wilful, intentional or deliberate attempt to circumvent or otherwise create a jurisdictional or procedural problem for either the Court or the defendants. He was, and still is, a victim of circumstance, and perhaps, honest negligence.

The defendant union cited McDonnell-Douglas Corporation vs. Green, 411 U.S. 792, 92 S.Ct. 817(1973). As in the case of Stebbins, supra, McDonnell-Douglas does not directly address the issue of what constitutes a timely suit under Title VII as it relates to a Rule 41(a)(2) dismissal. In fact, McDonnell addresses a point unrelated to the issue of the Statute of Limitations, i.e., whether the absence of an EEOC determination of reasonable cause bars a suit

under an appropriate section of Title VII; what are the rules as to the burden of proof in a private, non-class-action complaint under Title VII; and what constitutes a shifting of the burden of proff in establishing a prima facie case. Moreover, in McDonnel-Douglas, plaintiff was given a Right to Sue Letter in March, 1968, and filed his suit in April, 1968, and the Court found that the plaintiff-respondent had satisfied the jurisdictional prerequisite by filing the suit on a timely basis.

The closest case which plaintiff found that addressed the issue raised by defendants in their motions to dismiss , was interestingly enough, cited by the Court of Appeals in Braxton vs. Virginia Folding Box Company, et al., 72 F.R.D. 124 (E.D. Va., Richmond Division, 1976). In Braxton, the Court held that there are certain equitable grounds under which the application of the Statute of Limitations will

result in an injustice to a party. The facts of this case are also distinguishable from the instant case in that the Appeals Court entered a nunc pro tunc order because the plaintiffs voluntarily withdrew their motion to intervene in light of an understanding between the Court and all counsel concerned so that the original action could proceed as a separate suit. The Court found that a voluntary withdrawal of the motion to intervene was conditioned upon the understanding of the intervenors that they would be permitted to file a separate action, and the Appeals Court, in exercising its inherent equitable powers to modify an interlocutory order at any time prior to final judgment allowed the intervenors to file their complaint nunc pro tunct, holding:

> Plaintiff's claims are not so inconsequential to be permitted to punish by reason of a tactical blunder. The Court is satisfied that the intent of all parties was that the Braxton case would proceed as a separate action. The

> defendants moreover have not convinced the Court that they would be prejudiced in any manner by permitting this action to continue as contemplated in the January 22, 1976 hearing held in Crocket. Justice requires that the Court do what should have been done in February of 1976. Accordingly, the Court will vacate the Order dated February 4, 1976, in Crocket and enter an Order nunc pro tunc reflecting the understanding of the Court regarding the motion to intervene.
> 72 F.R.D. at 127

The Federal District Court for the Eastern District of Virginia, in following the ruling and line of reasoning in Braxton v. Virginia Folding Box Company, 72 F.R.D. 124(E.D. Va. 1976), erred in its interpretation and application of law to the instant case.

Spencer seeks the benefit of the inherent powers of this Court in a ruling that voluntary dismissal under Rule 41(a)(2) although not granted with

any condition as to his right to re-instate h-s claim, was conditioned upon his reinstituting his claim within fifteen days of the date of the order of dismissal, as well as complying with the other conditions set forth by the Court in its October 31, 1977 Order. Respondents have not established or alleged any prejudice to themselves if petitioner was permitted to proceed with his action. They sought a very technical and strained interpretation and construction of the 90 day Statute of Limitations.

Petitioner complied with the Statute of Limitations by filing his original suit within 90 days. Petitioner's action is one which grows out of an employment contract, but is brought under s-ecial federal jurisdictional grounds, to-wit: Title VII. The 90 day

Statute of Limitations is akin to a similar time limitation utilizes by most municipal corporations in actions against the corporation by requiring that the corporation be notified within a certain period, e.g. , ninety days, of the alleged injury or damage. After timely notification, the Statute of Limitations regarding the claim then applies.

There are no cases which hold that a voluntary dismissal of a claim without prejudice which was timely filed in the first instance bars the refiling of that claim where the Statute of Limitations is established by an administrative body.

The Title VII claim was valid because the original suit was timely filed and brought in the Federal District Court within the 90 day limitation im-

posed by Rule 42 U.S.C. § 2000e-5(F)(1). The dismissal of the suit on the eve of the trial on Spencer's motion because his counsel was not ready for trial did toll the running of the limitation period, and the subsequent suit, in a similar cause of action, brought by Spencer on November 14, 1977, was brought within the 15 day limitation period set forth within the order issued by Judge Robert R. Merhige, Jr., Federal District Court, Eastern District of Virginia, Richmond Division, on October 31, 1977. There was no res adjudicata and the statute of limitations had not tolled for the filing of this subsequent action. (Civil Action No. 77-0121-R); Mann vs. Merrill, Lynch, Pierce, Fenner, and Smith, Inc., 488 F.2d 75(5th Cir. 1973); Pond vs. Braniff Airways, 543 F.2d 347 (5th Cir. 1972); and Brown vs.

O'Leary, 512 F.2d 485(5th Cir. 1975).

On July 17, 1978, petitioner filed a motion for the issuance of a subpoena duces tecum to Greyhound requesting among other things, all information compiled by Greyhound "pertaining to the investigation and disposition of charter trip irregularities entering around Richmond, Virginia Terminal and D.M. Shingleton, formerly District Manager and Allen L. Owens, and other employees of either Greyhound and/or Amalgamated Transit Union".

Petitioner in his motion for subpoena duces tecum requested that the Court permit him to withdraw the produced material for a period of forty eight (48) hours for inspection and copying and to be thereafter returned. The trial court refused to permit petitioner to inspect the material filed

with the Court by Greyhound, ruling that material would be held in camera by the Court and the Court would rule upon its relev-ncy and materiality during the trial.

The hearing in chambers was not recorded because the trial court informed counsel that they would be able to place any objections, etc., on the record at the time the trial resumed.

During the hearing in chambers, counsel for petitioner requested the Court to permit him to review the subpeonaed material because he planned to call several Caucasian employees of Greyhound and the Union as witnesses and represented to the Court that their involvement in the charter fraud investigation would be relevant to their credibility, particularly if they had been either charged, reprimanded, or

otherwise implicated in the charter fraud scheme.

The trial court refused petitioner's request to review the subpoenaed material and the trial resumed.

The ruling by the Court effectively prevented counsel for petitioner from placing on record at the particular time during the trial what had transpired during the unrecorded hearing in chambers.

Although the Court in its ruling did give counsel an opportunity to write out by way of motion what he wanted to get on the record, the record will reflect that the trial continued until after 10:30 p.m., and counsel for petitioner did not think to write out the motion and include it in the record.

Trial court erred in denying counsel access to subpoenaed material

which would have had a bearing on the credibility and perhaps the motive of certain employees of Greyhound and the Union.

Petitioner contends that the subpoenaed material would have established that David . Shingleton, Sr., Allen L. Owens and other Caucasian drivers of Greyhound had been engaged during the years encompassing the investigation in a scheme to defraud Greyhound of large sums of money by falsifying the charter trip records of the company.

This evidence was relevant to the credibility of these witnesses who either took part in the termination of petitioner or were responsible for representing Spencer under the collective bargaining agreement.

Petitioner submits that the Court, in Pullman vs. Hall and Simon vs. United

States, held that for purposes of impeaching the credibility of a witness, the witness may be questioned as to misconduct, even as to collateral matters, "which has a tendency to show his lack of honesty or truthfulness". Pullman Company vs Hall, 55 F.2d 139, 141 (4th Cir. 1932): Simon vs. United States, 123 F.2d 90 C4th Cir. 1941), cert. denied, 314 U.S. 694. 62 S.Ct. 412 (1941).

The petitioner contends that the trial court was faced with a credibility problem, particularly in weighing the testimony of Shingleton, who was District Manager over the Richmond District, and Allen L. Owens who was President of Local 1516 and represented petitioner through thr grievance steps subsequent to his termination from the company.

Petitioner submits that the trial

court erred in refusing his counsel's request to review the documents which contained information of dishonest conduct on the part of persons who petitioner contended discriminated against him.

In addition, the Appellate Court, in ruling that there was no error in the District Court ruling in refusing to allow counsel for petitioner access to certain subpoenaed materials for impeachment purposes filed with the Court in camera , gave no reason in it's decision on this finding. The Court did not address itself to the question of whether such evidence should be available for impeaching the credibility problem. Pullman Company vs. Hall 55 F. 2d 131, 141 (4th Cir. 1932); Simon vs. United States, 123 F.2d 86 (4th Cir. 1941), cert. denied, 314 U.S. 694, 62

S.Ct. 412 (1941).

There was an abuse of discretion of the trial court in dismissal of the Title VII claim filed by the petitioner.

The right of a litigant to be heard is one of the fundamental rights of due process under the law. A denial of such right requires reversal of the decisions below.

Confrontation of the witnesses with the data contained within the subpoenaed materials for purposes of impeachment of their testimony and with regards to the credibility of the witnesses, is a key constitutional right which cannot be denied to the petitioner.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO PROPER

OF 42 U.S.C. §2000e-5(F)(1).

Section 2000e-5(F)(1) of Title 42 provides that a suit charging violation of any provision of Title VII of the Civil Rights Act of 1964 shall be timely filed and brought within 90 days from the issuance of a Right to Sue Letter from the EEOC.

The Fourth Circuit held in this case that the 90 day period for filing Title VII actions was not tolled by the pendency of the original suit which was timely filed. The Fourth Circuit, in following Stebbins vs. Nationwide Mutual Insurance Company, 469 F.2d 268 (4th Cir. 1972), cert. denied, 410 U.S. 939 (1973), McDonnell-Douglas Corporation vs. Green, 411 U.S. 792 (1973) and Braxton vs. Virginia Folding Box Company, et al., 72 F.R.D. 124 (E.D. Va. 1976) has erroneously interpreted

the factual situation presented in the case at bar in finding that the statute had tolled. Each and everyone of these cases is clearly distinguishable from Spencer.

The thread of opinion and interpretation followed in Mann vs. Merrill, Lynch, Pierce, Fenner and Smith, Inc., 488 F.2d 75 (5th Cir. 1973); Pond vs. Braniff Airways, 543 F.2d 347 (5th Cir. 1972); and Brown vs. O'Leary, 512 F.2d 485 (5th Cir. 1975), upholds the petitioner's right to proceed with the Title VII action. For all intent and purposes, the denial of petitioner's suit under Iitle VII operates as a dismissal with prejudice of the cause and such severe sanction should only be used in extreme circumstances. The petitioner had made substantial compliance with 42 U.S.C. Section 2000e-

5(F)(10. In the trial court, the motion for continuance was denied, but the motion for voluntary dismissal was granted on October 31, 1977 with the provision that any new suit on the same causes of action be filed within 15 days of the voluntary dismissal. The second suit was filed with the Federal District Court for the Eastern District of Virginia on November 14, 1977, within that 15 day period. That provision of the original suit dismissed was complied with and it is argued that the Federal District Court for the Eastern District of Virginia could not, in contravention of that provision, dismiss the Title VII action because of tolling of the 90 day period.

2. THE DENIAL OF THE SUBPOENA DUCES TECUM OPERATED SO AS TO PREVENT PETITIONER FROM

CONFRONTING WITNESSES FOR RESPONDENTS WITH CROSS EXAMINATION DATA WHICH WOULD HAVE HAD DIRECT BEARING ON THE RELEVANCY AND CREDIBILITY OF THE WITNESSES' TESTIMONY.

Rule 34 of the Federal Rules of Civil Procedure affords each party to a suit the right of discovery and access to pertinent materials having substantial bearing on the case in the possession of the opposing party.

Pullman Company vs. Hall, 55 F.2d 139 (4th Cir. 1932) and Simon vs. United States- 123 F.2d 80 (4th Cir. 1941) clearly notes that for purposes of impeaching the credibility of a witness, the witness may be questioned as to misconduct, even as to collateral matters, "which has a tendency to show his lack of honesty or truthfulness". It is

argued that had the materials requested in the subpoena duces tecum been made available to the petitioner, counsel for the petitioner would have been able to show lack of credibility of the very witnesses relied upon by the respondents to dismiss the petitioner and diminish the very testimony relied upon by the trial court in rendering its decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement and opinion of the Fourth Circuit and the United States Court of Appeals for the Fourth Circuit.

Respectfullu submitted,

Sharon F. Clark

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Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

JUNE TERM, 1980

STANLEY H. SPENCER, Petitioner,

v.

AMALGAMATED TRANSIT UNION, LOCAL # 1516

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I hereby certify that on this 28th day of February, 1980, three copies of the Petition for Writ of Certiorari , were mailed, postage prepaid, to Charles Orlove, of Jacobs, Burns, Sugarman & Orlove, at 201 North Wells Street, Chicago, Illinois, 60606, and to

Alexander Wellford, of Christian, Barton, Epps, Brent & Chappel, of 1200 Mutual Building, Richmond- Virginia, 23219, counsel for respondents. I further certify that all parties required to be served have been served.

Sharon F. Clark

Sharon F. Clark

15 North Thompson Street
Richmond, Virginia, 23221

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNPUBLISHED OPINION

No. 78-1428
No. 78-1832

Stanley H. Spencer, Appellant,

-v-

Greyhound Lines, Inc.
and
Amalgamated Transit Union,
Local Union Division No. 1516,
Appellees.

No. 78-1872

Stanley H. Spencer, Appellee,

-v-

Amalgamated Transit Union
Local Union Div-sion No. 1516,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Judge.

Argued October 3, 1979
Decided November 1, 1979

Before BUTZNER, RUSSELL, AND SPROUSE, Circuit Judges.

Stanley Spencer, appellant pro se, Sharon F. Clark for Stanley Spencer, (Sa'ad El-Amin, Sa'ad El-Amin and Associates on brief) for Stanley Spencer; William F. Etherington (R. Harvey Chappel, Jr. Alexander Wellford, Christian Barton, Epps, Brent & Chappel on brief) Charles Orlove (Jacobs, Burns, Sugarman & Orlove, Andrew W. Wood, White & Wood on brief) for Greyhound Lines, Inc. and Amalgamated Transit Union, Local Union Division No. 1516.

PER CURIAM:

These consolidated appeals assign error to the d-strict court's dismissal of Stanley Spencer's claims against his employer, Richmond Greyhound Lines, Inc., and his union, Amalgamated Transit Union, Local No. 1516, for wrongful discharge in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.

The union appeals, seeking to increase the district court's award of costs and fees in its favor.

We affirm the district court's dismissal of Spencer's Title VII claim because suit was not filed within the 90 day limitation imposed by 42 U.S.C. § 2000e-5(F)(1). The pendency of a prior, identical action, which was dismissed on the eve of trial on Spencer's motion did not toll the running of the limitation period. Hall v. Kroger Baking Co., 520 F.2d 1204 (6th Cir. 1975); Stebbins v. Nationwide Insurance Co., 469 F.2d 268 (4th Cir. 1972)

The § 1981 claim was tried by the court without a jury. After an in camera inspection of company documents produced pursuant to a subpoena duces tecum, the district court ruled that the documents need not be furnished to Spencer, who sought to use them for impeaching two witnesses on collateral matters. We find no error in this ruling. The court's finding that Spencer was not discharged because of his race is supported by the evidence. Consequently, we affirm the dismissal of the § 1981 claim.

The district court allowed the union costs and an attorney's fee. The union asserts, however, that the amount ordered was less than qts expenses and fees. We find no abuse of discretion in the district court's determination of the amount of the award.

AFFIRMED.

OPINION:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA

STANLEY H. SPENCER

v.

GREYHOUND LINES, INC.
and
AMALGAMATED TRANSIT UNION,
LOCAL # 1516

THE COURT: Now gentlemen, I am going to try to give my findings of fact and conclusions of law at this time. I reserve the right to supplement them, add citations, and correct my grammatical errors. Unfortunately, I'm afraid it will be somewhat disjointed because I want to give you as complete a one as I can.

I think the important thing, at least to me, especially in cases of this nature, is that when a Court has decided the matter, you ought to look people right in the eye and tell them about it. The matter comes before the Court on motion of the plaintiff, Stanley Spencer, a black male who seeks a declaratory, injunctive, and monetary relief.

This is a 42 U.S.C. Section 1981 case. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1343.

The defendants are Greyhound Lines, Incorporated, engaged in the transportation field, and the Amalgamated Transit Union, Local Union Division 1516, located in Richmond, Virginia, whom plaintiff claims unfairly represented him because of his race.

The evidence discloses that the plaintiff, then employed by the defendant, Greyhound, as a bus driver, was transferred by the defendant from New York to Virginia. There were several subsequent transfers both from Richmond to Washington and then, I believe, to Norfolk; he was discharged on 12/18/75.

Plaintiff's theory of the case is that he has been discriminated against because of his race. Section 1981 provides a cause of action for racial discrimination in the making and/or enforcing of a contract, Johnson vs Railway Express Agency, Inc., 421 U.S. 454 (1975).

Plaintiff has produced statistical evidence. While I am not certain of the precise testimony of Dr. Kilpatrick, I am of the view it shows that 37 percent of the black drivers were terminated while only 8 percent of the white drivers suffered a similar fate.

I believe Dr. Kilpatrick referred to something about 55 percent to 25 percent. Whatever the figures were, they were impressive, and I do want to emphasize that I am deciding the case of Stanley Spencer vs Greyhound, not any other case.

I am deciding it as best I can on the evidence that is before the Court today. No one is to think that my conclusions today will have any bearing on any future cases that come before this Court.

I must say that the statistics attracted my attention quite a bit.

The plaintiff has attempted to establish his case by certain witnesses, none of whom the Court disbelieved. In his effort to show that Greyhound, in particular used race as an ulterior motive in dismissing plaintiff from employment, plaintiff has satisfied this Court, from the evidence presented, that plaintiff's race was, indeed, considered by certain personnel of Greyhound.

Race was considered in matters involving Mr. Jones, a black employed by Greyhound. He had an altercation with a white lady who worked at the ticket office, that is, a heated discussion. He saw things that he felt were grossly improper, prompting the discussion wherein race was referred to.

I believe that Mr. Thornton, another black employee of Greyhound, testified

that at least one person in Greyhound's Richmond office used a derogatory word, one that I'll not even use. I am not sensitive about language, but, if I were black and I were called that phrase, somebody would get a punch in the nose. So there were racial tensions at the terminals. I have no doubt about that, none whatsoever from the evidence that I have heard.

Mr. Bowman testified that he is the director of employee relations. He is a black man in charge of affirmative action matters for the Company. He had complaints of racial discrimination in the terminal. He testified to that, and I accept that.

I find, though, that Mr. Spencer made no complaint of racial discrimination at the time of his discharge. I do find that he did mention it when he later met with Mr. Bowman and he did mention it to Mr. Owen of the Union, but in a vague manner.

Now Mr. Spencer's testimony establishes beyond a doubt that, he has a terrible record for obeying Company rules; although amazingly enough, he was a good driver; but the rules apparently didn't mean much to him.

The Court finds that Mr. Spencer was charged with falsifying certain pay records -- I think that was in April of 1975 -- though not for the purposes of getting money that he wasn't entitled to; there wasn't anything dishonest in that sense, but it was a violation of Company policy.

In addition to that, he was guilty of not turning in his logs. Interestingly enough, the logbook itself establishes that it shall be turned in -- I read it here -- dated, and daily. I might say the procedures of Greyhound from the evidence before the Court was sloppy until recently. Nevertheless, however, Mr. Spencer had been warned about the log situation several times. Plaintiff also drove a bus after his health certificate, physical certificate, had expired, although the esoteric argument of whether it expired at 11:59 on the 29th or 11:59 on the 30th is of no consequence. I am satisfied it expired on 11/29/73 as the Company interpreted the rule.

The Court accepts Mr. Owen's testimony that, when Mr. Spencer went to

Mr. Owen, President of the Local Union, for assistance, he put Mr. Owen, by virtue of his demands, in a position that even Mr. El-Amin couldn't have won the case before the Company.

He had been suspended sometime before, as I recall, and he wanted to receive back pay for that period. He also wanted his record clear. These were ridiculous demands under the circumstances. I don't see how anybody could reasonably expect the Union to be able to get any company to clear the record of somebody who has admitted he has falsified records. That is just, in my view, utterly ridiculous.

Now Mr. Shingleton, the Greyhound district manager, testified; he was the gentleman who ultimately recommended Mr. Spencer be discharged. The Court has no doubt about that, and I think Mr. Shingleton admitted, that in the course of a discussion with Mr. Spencer about Spencer's not being paid for a charter that he was entitled to, that Mr. Spenter threatened to go to the Labor Board or someplace of that nature.

Mr. Shingleton responded that he didn't care where Mr. Spencer went, Labor Board or EEOC or NAACP. That might be indicative of the fact that race was on Mr. Shingleton's mind. I am satisfied it was. I don't know if it still is in the minds of people up there, but it certainly was in 1975.

Now the next witness to testify was Mr. Owen. The Court was impressed with Mr. Owen's testimony. I am satisfied that he has no racial animus in any way whatsoever. His duty as President of the Union was to see to it that Mr. Spencer, who is a member of that Union, received fair representation.

I have already commented that it was impossible for Mr. Owen to do what Mr. Spencer demanded of him. Mr. Spencer, as I have observed him, is a litigious person. I am not critical of that. Some people are and some people aren't, but he is.

He had threatened a lawsuit, according to Mr. Owen's ~~testimony, for~~ some time. As a matter of fact, at one point, he said he really didn't care what they did

because he wanted to sue them anyway. He did, and he ought to if he thinks he has a claim. I am not critical of that.

What I am trying to point out is: I accept the fact Mr. Owen did all he could do, that indeed race was not on Mr. Spencer's mind when he was discharged. He knew why he was discharged. He was upset and angry, but he didn't complain about any racial animus at the time he took matters up with Mr. Owen. That was an afterthought, in the Court's view. At a hearing with Mr. Bowman was the first time he mentioned race, and then there wasn't anything specific.

In any event, there is an obligation -- I will dispose of the Union quickly -- the matter of Spencer's complaints against the Company went to the executive board of the Union as to whether they should arbitrate Mr. Spencer's grievance. The board determined not to do it. There is no duty on the Union to arbitrate all grievances. The duty is to give fair representation to their members.

It was recommended by the executive

board that they not arbitrate because they did not feel they could win, and it could cost about $5,000.00 to arbitrate. They fairly and objectively determined that Spencer's complaint was not well founded.

I disagree with Mr. El- Amin's suggestion that the Union has to seek arbitration in every instance. They don't. They just have to treat everyone fairly, as they appear to have done. The issue was put up to the membership. I think 8 people voted to arbitrate while the remainder were against arbitration. It was suggested that the vote just represented the number of blacks who were present. I am satisfied from the last witness' testimony, I believe it was Mr. Meeks, that he voted to arbitrate. He was a member of the white race, so I can't assume it was all blacks who voted that way.

Mr. Owen testified as to the people that he had represented, trying to get them reinstated or prevent them from being fired, and stated that Mr. Shingleton had discharged both black and white drivers. I accept that.

Mr. Brown, who was black, was reinstated, while two white gentlemen were not reinstated. Mr. Garris and Mr. Gregory, I believe, were black gentlemen. They were reinstated. Mr. Hale, a white gentleman, was not reinstated. Mr. Harrison, white, was reinstated, and Mr. Nichols, white, was reinstated. Mr. Roache, white, was reinstated. Mr. Wright, a black, was reinstated. At least in reinstatement aspects, race was not a factor with Greyhound. As a matter of fact, it would appear that Mr. Spencer is the only black operator who had not been reinstated. The Court is of the view that he was not reinstated, not because of his color, but because he was an employee who violated the rules of the Company.

Now then some legal discussion about Title VII and 1981, which bothers me somewhat, simply because I want to satisfy my own mind as to whether I would end up with a different result if this were Title VII as distinguished from 1981.

Title VII and 1981 paralleled overlapping remedies against discrimination. See

Alexander vs Gordon Denver Company, 410 U.S. 46. So they are akin, and I do not view the Washington vs Davis and Grace ruling to mandate a conclusion of disproportionate impact premised on Mr. Kilpatrick's testimony. Disproportionate impact, alone, no longer suffices to establish a prima facie case of employment discrimination in 1981 cases. Stevens vs County of Los Angeles, a 10th Circuit, 1977 case.

I think the statistics are important, but they don't outweigh all the evidence the Court has heard. The statistics may not be a determinative factor for an individual as opposed to a class action discrimination case. See King vs Yellow Freight, 523 F.2d 879, 8th Circuit, 1975. Statistics may be probative and supportive of an individual employee's contention that an employer has discriminated against him or her on impermissible grounds. In Harper vs Trans World, 525 F.2d 409, 1975.

In short, except arguendo in an individual discrimination case, the burden is on a plaintiff to affirmatively prove

racial discrimination as to him. In the instant case, the Court is satisfied, that race did not play any part in Mr. Spencer's discharge. He was discharged because the Company felt that he had violated certain policies. He admitted he violated them. It is not for the Court, of course, to say whether the Court would have done the same thing had it been sitting in the position of the Company, because I am not here to run the Greyhound Bus Company.

I conclude not only that the evidence fails to disclose any discrimination against Mr. Spencer on account of his race, but that Greyhound has satisfied the Court that his discharge was on legitimate grounds without regard to race. While the Douglas test of the burden is of doubtful application, it is of no consequence in light of the Court's satisfaction that Mr. Spencer's discharge was for legitimate non-discriminatory reason.

Judgment will be entered for both defendants.

I thank counsel for your help. It

was a difficult case, I am sure, for both sides, for cases such as this are never pleasant; but I think that I am -- as I think any Judge should be -- attuned to racially discriminatory actions, and then when I find them, I do something about them. In this case, however, there has been no showing of racial discrimination.

Thank you for your help.

CONCLUSION